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In The

Supreme Court of the United States

DOW CHEMICAL COMPANY,
MONSANTO CHEMICAL, et al.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE LAW PROFESSORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. What is New and What is Not: Petitioners Propose the Abandonment of Traditional Rules and Principles of Procedure	4
II. The Rule Allowing Collateral Attack by an Absentee on the Adequacy of Representation is an Expression of the Central Tenet of Due Process that All Persons and Entities Are Free to Ignore the Judgments of Courts that Lack Legitimate Power over Them	8
III. The Existing Law on Collateral Attack is in Harmony with the Real World; Petitioner's Proposals Are at War with It	20
IV. Petitioners Rely on Analogies That Make No Sense	26
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).....27

Dusenberry v. United States, 122 S.Ct. 694 (2002).....19

Devlin v. Scardelletti, 122 S.Ct. 2005 (2002).....12, 13, 16

Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999)...*passim*

Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997).....4, 13

Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000)..... 5

Hansberry v. Lee, 311 U.S. 32 (1940).....*passim*

In re Agent Orange Products Liab. Litig., 818 F.2d 145 (2d Cir. 1987).....12

In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation, 134 F.3d 133 (3d Cir. 1998).....24

International Shoe v. State of Washington, 326 U.S. 310 (1945).....18

Kamilewicz v. Bank Boston Corp., 100 F.3d 1348 (1996).....26

Martin v. Wilks, 490 U.S. 755 (1989).....14

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).....12, 13

Matthews v. Eldridge, 424 U.S. 147 (1979).....19, 27, 28

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).....12, 27

Phillips Petroleum v. Shutts, 472 U.S. 797 (1985)..11, 12, 15

Richards v. Jefferson County, 517 U.S. 793 (1996).....23

TABLE OF AUTHORITIES – Continued

Page

Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)..... 3

South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999).....23

Teague v. Lane, 489 U.S. 288 (1989).....27

Zogofros v. Qwest Communications, 225 F. Supp. 1217 (D. Oregon 2002) 24

RULES

Federal Rule of Civil Procedure 23.....*passim*

OTHER AUTHORITIES

Katherine Ikedam, *Silencing The Objectors*, 15 GEO. J. LEGAL ETHICS 177 (2001).....24

Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).....24

Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998)..... 6

Newberg on Class Actions, Section 1625 (3rd ed. 1992)..... 4

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEG. STUD. 521 (1997)..... 7

Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996)..... 7

TABLE OF AUTHORITIES – Continued

Page

Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenge*, 71 N.Y.U. L. REV. 74, 140 (1996).....25

Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 (2000)..... 6

Charles A. Wright, *Class Actions*, 47 F.R.D. 169 (1970).....20

Wright, Miller & Cooper, Federal Practice and Procedure, Section 4455 (2002).....4, 5, 6, 15

INTEREST OF THE AMICI CURIAE

Amici are law professors who teach and write on the role of federal and state courts in class actions and thus have a strong and continuing interest in the development of the law in this field.

Amici hope to persuade this Court to retain the traditional rule that *every* absent class member is entitled to collateral review of the adequacy of representation accorded to him or her in a class action proceeding. We expect respondents to argue that ~~there are~~ many reasons, particular to this case, for the Court to hold that a collateral attack is permissible here, *e.g.*, special notice problems stemming from the future nature of these claims, and the absence of settlement funds from which to compensate the respondents. We recognize the force of those arguments. Indeed, it is because the circumstances here are so compelling that we write to emphasize the problems with a holding in this case that concentrates on the peculiarities of the respondents' situation. The right to collateral attack must be preserved for *all* absentees. We submit this brief to make that argument.

None of the amici has any financial or other similar interest in the outcome of this lawsuit or any suits raising similar issues. All of the parties have consented to the filing of this brief.[1]

---

[1] This brief was not authored, in whole or in part, by counsel for any party. Other than the amici on whose behalf this brief is submitted, and their counsel, no person or entity made any monetary or other contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

Petitioners sound an alarm: Beware of radical new law. We agree, but it is petitioners who argue for radical change and their plea should be rejected.

The traditional rule in this country has been, and is, that absent class members may collaterally challenge, and receive *de novo* review of, the adequacy of representation afforded them in a class action proceeding. This traditional rule flows from two time-honored principles: (1) under the Due Process Clause, adequacy of representation in fact, and at all times, is a prerequisite for a court's exercise of jurisdiction over absentees, and (2) a court lacks the authority conclusively to determine *for other courts* the *res judicata* effect of its judgments. Petitioners propose, in effect, the rejection of the traditional rule and hence the weakening of the two principles underlying that rule (and also underlying a substantial portion of our law of procedure unrelated to class actions).

The traditional rule is necessary to ensure that absentees receive minimally fair treatment in class action proceedings. As this Court and others have long recognized, there is a substantial risk of collusion between class counsel and defendants in class actions because class counsel has great control over the proceeding and counsel's interests are never perfectly aligned with the absent class. Because of the risk of collusion, even the most conscientious judge may lack the information necessary to ensure that the rights of absentees are secured. Objectors are unusual in class action proceedings, and even when they are present, they cannot be presumed to represent absentees adequately. In many cases their interests may be quite remote from substantial segments of the absent class, and no procedure exists, is followed, or would make

sense to ensure that objectors are "adequate" before their objections are entertained.

This Court's affirmance of the traditional rule will not unsettle class action practice as it currently exists. Plaintiffs' lawyers have little incentive to bring collateral actions except in very unusual cases, and defendants have ample incentive to settle class actions despite the possibility of a future collateral challenge. The proof is in the pudding: although absentees had the right to attack collaterally in all the federal circuits prior to 1997 and retain that right in all but one of the circuits since 1997, class actions have settled and continue to settle in almost all cases.

This Court should reject petitioners' plea to disturb settled law by the adoption of a rule barring collateral review. Rejection is required both in the interest of validating cherished principles of due process, and in the interest of avoiding the disruption of class action practice and other litigation practice as it has existed in this country for decades.[2]

---

[2] This brief addresses the question whether the federal constitution requires that an absentee class member be allowed to attack collaterally the adequacy of representation in a class action that resulted in a settlement or other judgment. But in the event that this Court rejects our argument and determines that the existing rule on that question should be changed, we submit that, under this Court's decision in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the case should be remanded to the court below in order to determine (a) what preclusive effect would be given in such a case by a New York state court, and (b) whether that effect is inconsistent with any compelling federal interest.

ARGUMENT

I. What is New and What is Not: Petitioners Propose the Abandonment of Traditional Rules and Principles of Procedure

Petitioners and amici in support of petitioners argue that this Court should not adopt a novel approach to preclusion in class actions. We agree. The problem, however, is that petitioners and their amici would have this Court believe that it is respondents who advocate the new rule and petitioners who stand with precedent and tradition. That is false.

The state of the law is this: Until 1997, when the Ninth Circuit issued its decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999) [hereinafter *Epstein III*], the settled rule in every circuit in this country was that any absentee (nonparticipating) class member who was purportedly bound by any class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action. *See e.g.*, *Wright, Miller & Cooper, Federal Practice and Procedure*, Section 4455, at 484-87 (2002) (describing *Epstein III*'s new approach and contrasting it unfavorably with the traditional approach allowing adequacy to be challenged in a collateral proceeding)[3]; *Newberg on Class Actions*,

[3] *Wright, Miller & Cooper* says this of *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) [hereafter *Epstein II*], the panel opinion reversed by *Epstein III*:

> The initial panel opinion seemed surprising only by taking such great effort to reach conclusions that many students would have thought clearly required by long tradition. It has long been the general understanding that only adequate

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Section 1625, at 16-133, 16-137 (3rd ed. 1992) (explaining that Rule 23 "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment" and that "[d]ue process of law would be violated for the class judgment" to be held binding "unless the court applying *res judicata* could conclude that the class was adequately represented in the first suit.").[4]

Moreover, putting aside for the moment legitimate questions about whether even the Ninth Circuit adheres to the rule announced by the panel in *Epstein III*[5] (a panel

> representation can justify preclusion against nonparticipating class members.
>
> *Wright, Miller & Cooper*, Section 4455, at 485.

[4] Petitioners maintain that when they agreed to pay $180 million in settlement they relied on their belief that no one, no absent class member, could ever obtain collateral review thereafter on the grounds that he or she had been inadequately represented. *Petitioners' Brief*, at 12. If petitioners so relied, they did so unreasonably. As of 1984, not a single circuit in this country had adopted the position that absent class members are precluded from seeking and obtaining collateral review based on inadequacy of representation. Indeed, the fact that petitioners inserted language into the settlement agreement to the effect that absent class members were forever barred from bringing any collateral actions, *see Petitioners' Brief*, at 17, suggests that petitioners themselves understood that the background legal regime did not bar such actions. Petitioners certainly should have understood that the settlement language by itself could do nothing to change the due process limits on binding absent class members in the absence of adequate representation. *See infra* Section III (discussing the possibility that the insertion of language in class action settlements purporting to bar future litigation is intended to mislead unsophisticated class members).

[5] *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-58 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1247 (denying preclusion in part because absent class members were not adequately represented in original action).

that was reversing itself),[6] absent class members elsewhere in the country remain free to attack collaterally the adequacy of representation they received in the original class action proceeding. Yes, a few panels in a few circuits seem somewhat positively inclined toward the *Epstein III* position, but thus far we know of no other circuit that has adopted the position on collateral attack of adequacy articulated in *Epstein III*, a position petitioners now ask this Court to adopt.[7]

The notion that a legal principle universally accepted before 1997 and all but universally accepted today is "new," and would result in the end of class action settlement practice as we know it, is, quite simply,

[6] The panel's first opinion, holding that the plaintiffs were inadequately represented and thus not bound by the settlement in the original class action proceeding, was written by Judge Norris and joined by Judge Wiggins. Judge O'Scannlain dissented. Two days after the decision was entered Judge Norris retired from the bench. Two weeks later the defendants filed a petition for rehearing. Judge Thomas replaced Judge Norris on the panel. The reconstituted panel granted the rehearing petition and a year and a half after the first opinion, the view expressed by Judge O'Scannlain in dissent was adopted by a new two person majority: Judge O'Scannlain himself and Judge Wiggins, who apparently had changed his mind. Judge Thomas, the new member of the panel, dissented. Thus, putting aside Judge Wiggins' two votes as cancelling themselves out, one judge, Judge O'Scannlain, voted for the no collateral attack of adequacy rule, and two judges of the Ninth Circuit voted against it. *See Wright, Miller & Cooper*, Section 4455, at 479 (detailing this history).

[7] For an excellent overview of this area of law, and a powerful argument against *Epstein III*, see Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 (2000). For an earlier, forceful defense of the absentee's right to bring a collateral attack, see Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

incomprehensible. Petitioners' and amici's doomsday scenarios about the practical effect of allowing absent class members to attack adequacy in collateral proceedings are premised on the false claim that we have been living in a world where absent class members had no such right. When that misleading notion is stripped away, we are left with the following truths: Class actions almost always settle,[8] and that phenomenon did not begin after *Epstein III*.

Indeed, there is no evidence that we know of to suggest that the settlement rate went up after *Epstein III*, a fact that is not surprising given how little room there was for an increase. Nor is there any evidence that the availability of collateral review of adequacy of representation throughout this country has ever resulted in a heavy caseload of collateral review litigation in any court. The rate of class action settlements is not going to drop, and the incidence of collateral litigation is not going to skyrocket, upon a ruling by this Court affirming what has long been the law. Once those truths are understood, there is precious little force left in petitioner's arguments, other than the misleading claim that deference is due the no-collateral-attack position because it is time-honored, which, as we have explained, it is not.

[8] *See, e.g.*, Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996) (reporting high settlement rates in class actions in all four of the federal districts included in the study), at 60; George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEG. STUD. 521 (1997) (observing that "virtually every mass tort action that has been successfully certified has settled out of court").

We, on the other hand, do not believe that the primary reason for this Court to leave the law as it has been for decades is that it has been that way for decades. Nor do we believe that the primary reason to leave the law as it has been is that it has not interfered to date with the settlement of class actions. Rather, the primary reason for this Court to affirm the traditional position on the right of an absentee class member to challenge adequacy in a collateral proceeding is that the well-established rule is correct. It is woven into the fabric of due process so tightly that pulling this one string out will mar the cloth in a manner that cannot be repaired without first pulling out a sizable number of related strings. Unless this Court is prepared to risk unraveling a major part of its due process jurisprudence, it should reject petitioners' invitation to throw out or substantially restrict the right of absent class members to challenge adequacy through a collateral attack.

II. The Rule Allowing Collateral Attack by an Absentee on the Adequacy of Representation is an Expression of the Central Tenet of Due Process that All Persons and Entities Are Free to Ignore the Judgments of Courts that Lack Legitimate Power over Them

This is a case about the power of courts to bind people to their judgments or as lawyers put it: it is a case about jurisdiction. More precisely, it is a case about the constitutional limits of legitimate jurisdiction under the Due Process Clause of the Fifth Amendment (and by extension the corollary clause in the Fourteenth). Although Justice Stone did not use the word jurisdiction in describing the Court's holding in *Hansberry v. Lee*, 311 U.S. 32 (1940), that the Due Process Clause had been violated, the

opinion he authored makes it clear that the limits of legitimate jurisdiction lay at the heart of the case:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. 714 [1871]. . . .
>
> To [that] general rule[] there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

Id. at 40.

What perfects a court's jurisdiction over absentees? Petitioners, following the panel in *Epstein III*, appear fixated on the following language from *Hansberry*: "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Id.* at 40-42 (1940). From there, petitioners and their amici leap to their assertion that Rule 23's "procedures," not present when *Hansberry* was decided (most notably the requirement that the first court make a finding on the adequacy of representation), meet what they treat as Justice Stone's any-fair-procedure test.[9]

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[9] We have clipped off the beginning of Justice Stone's sentence in our last quote from *Hansberry* because we do not rest our argument upon it. But it is worth noting what it states: "With a proper regard for

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But Justice Stone did not lay out an any-fair-procedure test. He identified one procedural protection – adequacy of representation – as sufficient to satisfy the demands of the Due Process Clause:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment *where they are in fact adequately represented* by parties who are present, or where they actually participate in the conduct of the litigation, *Plumb v. Goodnow's Administrator*, 123 U.S. 560 [1887]; *Confectioners' Machinery Co. v. Racine Engine & Mach. Co.*, 163 F. 914 [1908]; *Bryant Electric Co. v. Marshall*, 169 F. 426 [1909]. . . .
>
> In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit. *See Bernheimer v. Converse*, 206 U.S. 516 [1907]; *Marin v. Augedahl*, 247 U.S. 142 [1918]; *Chandler v. Peketz*, 297 U.S. 609 [1936].

Id. at 43 (emphasis added).

Two points in this passage deserve note. First, the rule binding people who were "in fact" adequately represented in the first court was "familiar" in the federal courts long before *Hansberry*; second, being adequately represented in fact was what Justice Stone meant by "such procedure." That is, adequacy of representation is the procedural protection that allows a court to bind absentees. Petitioners would have this Court substitute *a procedure for finding adequacy* for the *procedure of adequate representation* that Justice Stone described. There is no precedent for that substitution.

The idea that due process demands the adequate representation in fact of absent class members for the class action court to have jurisdiction over them is echoed in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, the Court did not hold, as petitioners suggest, that the Due Process Clause requires a procedure for the finding of adequacy in the original proceeding. Instead, the Court held that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of absent class members." *Id.* at 812. The "at all times" language of the Court in *Shutts* makes no sense whatsoever under petitioners' view of the Due Process Clause because it cannot be ascertained whether absentees were adequately represented "at all times" until after the original proceeding, including any appeal, has been

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divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process only. . . . " Thus, one could argue that if Justice Stone had laid down an any-fair-procedures test, that approach was driven by respect for our federalist system and would not be appropriate when interpreting the Due Process Clause contained in the Fifth Amendment as opposed to the Fourteenth, which was at issue in *Hansberry*. But because we do not believe Justice Stone's opinion supports such an interpretation with respect to any court, state or federal, we follow petitioners' truncated presentation of the "procedures" point.

completed.[10] In addition, the "at all times" language is inconsistent with the notion that a procedure for finding adequacy can be substituted for adequacy *in fact*.

To be sure, the particular issue before the Court in *Shutts* was whether a court in one state may exercise jurisdiction over absent class members from other states who otherwise lack any connection to the forum state, and it was in that setting that the Court held that due process forbids the exercise of such jurisdiction without adequate representation and notice (and, at least in some class actions, a right to opt-out). Nonetheless, it is significant that federal courts (including the Second Circuit in the direct appeal taken by objectors to the original settlement in this case, *In re Agent Orange Products Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)), consistently take for granted that their jurisdiction over absentees (whether within or without the federal court's usual geographical reach) is dependent on the factors detailed in *Shutts*. Even the dueling *Epstein* panels in the Ninth Circuit share the understanding that *Shutts* applies to all absentees.[11] *Devlin* undercuts, rather than

[10] Most recently, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court reaffirmed the "constitutional requirement" that "the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* at 846 n. 24 (quoting *Hansberry* and *Shutts*).

[11] Petitioners wrongly maintain that *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), and *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002) – support their view that the Due Process Clause does not afford absentees a right to seek collateral review of the adequacy of representation in the original proceeding. This Court in *Matsushita* specifically disavowed consideration of that issue. *See Matsushita*, 516 U.S. at 378 n. 5 (explaining that although "respondents contend that the settlement proceedings did not satisfy due process because the class was inadequately represented. . . . We need not address that issue . . . because it

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supports, petitioners' argument. The majority in *Devlin* held that class members who are not named in the complaint may appeal only if they objected to the proposed judgment, and even then only to the extent their appeal relates to their objections; all other class members not named in the complaint are regarded as non-parties for purposes of appeal and cannot appeal as of right. 122 S. Ct. at 2012-13. Justice Scalia's dissent, joined by Justices Kennedy and Thomas, adopts an even narrower view of what constitutes a party for purpose of appeal in a class action; ". . . . only members of a class who are . . . named in the complaint are the class representatives . . . it is only these members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgement." *Id.* at 2013 (Scalia, J., dissenting). Thus, to the extent *Devlin* bears on the issue of collateral review of adequacy of representation in class action lawsuits, both the majority and dissent suggest that at a minimum absent class members who did not appear in the original proceeding as objectors are non-parties to a class judgment, and hence are *not* precluded from seeking and obtaining collateral review. *See Epstein II*, 126 F.3d at 1241-42; *Epstein III*, 179 F.3d at 648. That assumption is correct because *Hansberry*, as we have just explained, is a case about the constitutional limits of jurisdiction over

is outside the scope of the question presented in this Court"); 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) (emphasizing that the Court could not address adequacy of representation issues because "this is a Court of final and not first review," explaining that arguments concerning adequacy of representation "remain open for airing on remand," and affirming "the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement.").

absentees, regardless of whether they are otherwise within a court's legitimate geographical reach.[12]

Most important, however, is that *Hansberry*'s reasoning on jurisdiction remains as right today as it was when written. The exercise of jurisdiction over absentees, represented in court by substitutes whom they did not choose and over whom they exercise no control, can be reconciled with time-honored notions of due process only if those representatives are adequate.[13] We do not understand anything in the briefs of petitioners or of their amici to contest that proposition. They simply don't say that jurisdiction is at stake. And for good reason.

Once the question at the heart of this case is understood to be a question of jurisdiction to bind absent class members, it becomes easy to understand why the traditional rule allowing collateral attack has stood for so long. There is perhaps no more fundamental precept of American law than that a court may not conclusively determine its own jurisdiction. That means that one who contests jurisdiction need not appear in the first court to make her plea and that an appeal by another from the first court's judgment does not bind one who has chosen not to appear.[14] *See Martin v. Wilks*, 490 U.S. 755, 762 (1989).

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[12] After all, the absentees in *Hansberry* were presumably otherwise subject to the geographical reach of the Illinois state court that purported to bind them.

[13] Put another way, adequacy is analogous (for all absentees regardless of geographical residence or other connections to a particular court's home base) to the requirement of minimum contacts as a basis for a court's jurisdiction over a defendant, a point we develop more fully below.

[14] Petitioners and their amici suggest that the presence and participation of objectors in a class action proceeding somehow can cure

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Finally, in examining the jurisdiction of the first court, the second court (where the contestor makes her claim) proceeds *de novo*.

The same tried and true procedural rules have always been and should remain applicable to absent class members. As *Shutts* puts it, absentees may "sit back and allow the litigation to run its course. . . ." *Shutts*, 472 U.S. at 810. Indeed, requiring absent class members to show up to contest anything in the first proceeding approaches an oxymoron. Class actions are designed for those instances when there are too many people to make joinder feasible. Yet, this Court is asked to adopt a rule requiring absentees to show up or forever hold their peace. It is not surprising that, as *Wright, Miller & Cooper* put it, a law student could be expected to get right a rule that *Epstein III* gets wrong,[15] and yet it is the approach of *Epstein III* that petitioners want this Court to embrace.

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the jurisdictional defect of inadequate representation in fact. But absent class members do not select, control or typically ever even know of the existence of objectors, and the objectors are not under even a nominal obligation to attempt to represent any absentees. How then can the presence of objectors, even a number of them, undo the failures of those charged with adequately representing absentees – that is, class counsel and class representatives? Petitioner's objectors-as-cure argument not only lacks any logical foundation but also flies in the face of what we know as an empirical matter about objectors – that too often their only goal is to be paid off to go away. *See infra* Section III (discussing the lack of incentives for objectors to mount serious objections to proposed settlements).

[15] *See Wright, Miller & Cooper*, Section 4455, at 485 ("The initial panel opinion [*Epstein II*] seemed surprising only by taking such great effort to reach conclusions that many students would have thought clearly required by long tradition.").

We have said that pulling on this thread would risk unraveling important sections of the fabric of due process. We mean foundational principles that describe a court's authority to bind absentees, outside the class action context. If, as we submit, adequacy of representation is a prerequisite to the jurisdiction of a court to bind an absent class member, to rule here that an absentee's challenge to jurisdiction may be conducted only in the original court (or, almost the same thing, that the second court may not determine the matter *de novo*), would suggest to other litigants and courts that similar exceptions will be made to the longstanding rule that any court judgment entered against an absentee without proper jurisdiction may be ignored.

Disturbing the understanding of how jurisdiction is contested would entail real costs, as opposed to the imaginary costs petitioners ascribe to what they mislabel as a "new" rule permitting collateral review. Just consider the increased costs for class action proceedings themselves. Absent class members (a category that today must embrace almost every American in at least one case) would have to monitor with care at least those class actions in which they have a significant stake, and the number of such actions is on the rise as courts continue to experiment with class actions as a means of resolving "mass torts." They would have to hire counsel, perhaps travel to distant courts, and object (just in case) in order to preserve their right to appeal should anything go wrong. *See Devlin*, 122 S. Ct. at 2012-13. Class action proceedings would be slower and more cumbersome as a result.

And then the question would arise, who and what comes next? Defendants, corporations and individuals alike, are now free to weigh the risks of not participating

in a proceeding in some faraway court with dubious claims to the exercise of legitimate power over them against the costs and the risks of challenging jurisdiction in that court. If this Court were to adopt petitioners' radically new rule, defendants would have to fear that this Court again might jettison foundational law and hold that they too should have shown up in the initial forum to contest jurisdiction. And then defendants, like absent class members, would be compelled to bear far greater litigation expenses and inconvenience than they currently do.

Moreover, if this Court demonstrates a willingness to jettison the foundation of what is necessary for the exercise of legitimate jurisdiction in this area, *i.e.*, adequate representation, then it is unclear why anyone should regard the other bases for the exercise of legitimate jurisdiction as secure. Why not jettison "minimum contacts" as a prerequisite for the exercise of personal jurisdiction over a defendant? If notice without more is enough to confer jurisdiction over absent class members, why should notice without more be insufficient to exercise jurisdiction over any defendant? If anything, notice should carry more weight, in jurisdictional terms, in the case of defendant corporations entitled to actual notice and equipped with lawyers to interpret that notice, than in the case of absentee class members who often "receive" as notice nothing more than largely incomprehensible television and radio announcements.

Consider, also, the likely consequences of this Court's acceptance of petitioners' argument that a procedure for establishing adequacy in the first court should stop all further inquiry into the matter. Is this Court then prepared to rule, as it almost certainly would be asked to do, that a procedure for determining minimum contacts (when

proceed *de novo*? We hasten to add that we are not suggesting that the Court jettison *International Shoe v. State of Washington,* 326 U.S. 310 (1945); rather, we seek to demonstrate just how disruptive petitioners' position might prove to be if this Court were to adopt it.

It is impossible to say precisely what petitioners and their amici would have this Court hold to be sufficient for the legitimate exercise of jurisdiction over absent class members. From what we can glean from their briefs, their two principal options seem to be: 1) notice (whether with or without an opportunity to opt-out, a point not clear to us from petitioners' and their amici's briefs); and/or 2) a procedure for determining adequacy.[16] As to notice by itself, we have already suggested why that option is less than coherent as a substitute for adequacy. Moreover, the notice issues in this case, which we do not address, constitute simply an extreme version of the general truth that class action notices cannot easily be equated to notice of an individual action: Individual notice of a lawsuit is rarely treated as junk mail. As for holding that a *procedure* for determining a jurisdictional prerequisite can substitute for the prerequisite itself, we have already indicated how that might disrupt settled jurisdictional understandings of the rights of absent defendants and alluded to the lack of

[16] Petitioners arguably suggest a third alternative: the presence of a court obliged to sit as guardian for the class. In other words, they seem to argue that Rule 23's requirement that class settlements must be approved by a judge is a viable substitute for adequacy of representation in fact. This is, in essence, an argument that the presence of a court, at least one charged to look out for the rights of absentees, gives that court legitimate jurisdiction. There is absolutely no basis in precedent or reason for such an evisceration of the concept of jurisdiction.

precedent for such a substitution. Most important, to substitute a procedural snapshot of a particular moment in time – a time before the proceeding has concluded – would represent a significant curtailment of the right heretofore guaranteed: adequacy throughout the proceeding.

Rather than acknowledging that the issue here is one of a court's jurisdiction to bind an absentee, petitioners present this case as if it involved some much more generalized question of due process, which this Court can make up as it goes along, using the open-ended balancing test outlined in *Matthews v. Eldridge*, 424 U.S. 147 (1979). But this Court has recently said that *Matthews* is not the appropriate test for procedural questions that this Court has traditionally analyzed through more directly relevant precedents. *See Dusenberry v. United States*, 122 S.Ct. 694, 699 (2002).

Adequacy of representation is the bedrock guarantee provided all absent class members in every form of class action in every court, federal and state. It has not just been the rule for a long time: it is the only explanation that is consistent with basic understandings of procedural justice that underlie much of this Court's Due Process Clause jurisprudence. But once one accepts that adequacy is the lynchpin of the constitutional exercise of jurisdiction – a reading consistent with all the provisions of Rule 23 as well as that rule's historical foundations and the arguments made at the time it was adopted, the adoption of any one of petitioners' positions might well amount to an unintended earthquake in procedural law. As Charles Wright has observed, Rule 23 "does not say" that all members of the class will be bound and recognizes "that a court conducting an action cannot predetermine its *res*

judicata effect, and that this can be tested only in a subsequent action. It recognizes too, that even a party named in the judgment will not be bound if he has been denied due process of law." Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 181 (1970). Moreover, there is no reason to risk such disruption because there is simply no basis, however exercised petitioners and their amici may be, to worry about leaving the law as it is.

III. The Existing Law on Collateral Attack is in Harmony with the Real World; Petitioner's Proposals Are at War with It

It is, we submit, self-evident that adherence to the traditional rule will not harm or even disturb the world of class action litigation. But, given the vehemence of petitioners' claims, we elaborate the point in this section.

Absent class members have always been allowed to ward off the defense of *res judicata* on the ground that they were not adequately represented. Although petitioners and amici argue that rational defendants would not settle (or not settle often) in a world in which collateral attack is available, they almost always do. After all, if a case does not settle, it will go to trial and judgment, and judgments are as subject to collateral attack for lack of adequacy as are settlements.

What then accounts for the alarm raised by the many corporations and business associations appearing in this case as amici? Perhaps they fear that the Second Circuit's opinion, or an opinion by this Court affirming settled law, would change the status quo by making plain a right that absent class members might now not be aware they possess. Notice that the petitioners admit, indeed try to use to their advantage, the fact that the settlement here

contained explicit language purporting to negate the availability of collateral attack. We are not surprised that such language was used because we believe, in light of our experience, that class notices often contain, sometimes in bold lettering, sentences telling the absent class members that failing to opt-out, or to object to a settlement, within the specified time will mean that they are forever barred from bringing any action in any court relating to the matters covered by the settlement.[17] Until and unless this Court rules otherwise, those statements are false, but perhaps defendants believe that these misstatements of law account for the rarity of collateral attacks.

In our view, however, the rarity of collateral challenges to class actions has little to do with misstatements of law contained in class notices, however ethically troubling those misstatements may be. Most collateral challenges to class action judgments or settlements – and certainly all challenges involving small individual claims – would take the form of a second class action that would be driven, for all practical purposes, by plaintiffs' lawyers,

[17] For example, consider the following language in a notice used in a recent class action against BaxterHealthcare involving persons who allegedly received contaminated blood plasma: "If the Court grants final certification of the settlement class and final approval of the Settlement Agreement, a final judgment shall be entered . . . forever barring every settlement class member . . . from prosecuting any past, present or future, known or unknown claim or lawsuit against Baxter. . . . " *See* Notice of Class Action Settlement in *In re Baxter Healthcare Corporation Gammagard Products Liablity Litigation* (C. D. Cal.), posted at http://www.aboblood.com/taint-settle.html.

and they would be extremely unlikely to be deceived by misstatements of law in class action notices.[18]

Therefore, something else accounts for the fact that one does not find and will not find plaintiffs' lawyers bringing frequent second class action suits on the ground that adequate representation was lacking in the first class action: The chance of persuading the second court (not an appeals court, but another trial level court) to say that the first court erred is exceedingly slim, even when the second court is proceeding *de novo*. Trial judges are naturally, and in most cases appropriately, reluctant to hold that another trial judge made such an error. More to the point, lawyers know that. Thus, there is little incentive for a plaintiff's lawyer (working almost always for a contingent fee) to bring a collateral attack. Moreover, to the extent that some plaintiffs' lawyers are interested only in seeking a quick payoff from class counsel and defense counsel as a *quid pro quo* for dropping nuisance or "strike suit"-type claims, those lawyers already have a ready means of doing so – *i.e.*, presenting or threatening to present objections in the class action proceeding itself.[19]

[18] Individuals with large individual claims might bring individual actions after a class action settlement, but plaintiffs' lawyers will surely also recognize the misstatements of law in class action notices.

[19] As the Advisory Committee's Comments to its latest proposals for amending Rule 23 stress, some objectors' primary purpose is to induce class counsel and defendants to reach a separate accord with them to make them go away. *See Excerpt of the Report of the Advisory Committee on Civil Rules, May 1, 2002*, posted at http:/www.uscourts.gov/rules/supct202.html. (explaining that "objections, which purport to represent class-wide interests . . . may augment the opportunity for obstruction and delay."). Even though objections to a class settlement are unlikely to scuttle the settlement altogether, the risk is

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If we are right, why are so many defendants and potential defendants pushing so hard for a rule that would "cure" a problem that does not exist – namely, a plethora of bogus collateral attack suits? There are two plausible answers. First, litigants pursue finality as an end in itself. Indeed, the reason defendants have embraced class action settlements as a means of resolving "mass tort" cases is that they provide a path around one-way preclusion, a legal precept that prevents defendants from using a victory in one individual law suit to bar suits by all those similarly injured. Class actions function as an important escape route, albeit a non-absolute one, from the effects of nonmutual preclusion. Petitioners and their amici want that escape route to be absolute. But to get there they need this Court to say: Although (in the absence of a relationship of privity) one individual pursuing a case with vigor can never bind another,[20] no matter how similar their two cases, a class action plaintiff and her lawyer – even with every incentive to settle on the cheap – can bind an entire group of people, even if *in fact*, as *Hansberry* puts it, adequate representation was lacking.

The second plausible reason for urging this Court to adopt an absolute rule is much less attractive, but all too real: The new rule would facilitate egregious collusion between class counsel and defendants. Consider what

too great for class counsel and the defendants to take: if the settlement is rejected by the court, every class member will be free immediately to sue individually (in a large stakes case), and every plaintiff's lawyer will be free immediately to file new class actions (in cases where the stakes are too small for individual suits).

[20] *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167 (1999).

happens in those rare cases when a trial or appellate court rejects a settlement on the basis of collusion or some other ground for determining that representation was inadequate. The parties can go to another trial court, change a term or two, although that is not technically necessary, and ask the second court to accept the deal.[21] One important, though hardly perfect, deterrent to such behavior is the prospect of *de novo* review by a second court in a collateral attack. *De novo* review avoids the unacceptable result that the last court's "adequacy of representation" finding will supersede the findings of inadequacy by the earlier courts. Thus, the availability of *de novo* review of adequacy of representation makes it less worthwhile for litigants to shop collusive settlements.

Moreover, settlement shopping is not the only way to obtain court approval for a collusive deal.[22] If, for example, counsel for an objecting member of the class succeeds in

[21] In *Zogofros v. Qwest Communications*, 225 F. Supp. 1217, 1223-24 (D. Oregon 2002), for example, the court concluded that class counsel and defendants "at some point, became unhappy that the court would not rush approval of their proposed settlement, but instead intended to carefully consider and thoroughly scrutinize it" and hence "abruptly remov[ed] themselves from the Chicago District Court's jurisdiction to start anew in Portland. . . . " Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 134 F.3d 133, 137 (3d Cir. 1998), after the Third Circuit set aside a class action settlement, "the parties repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it."

[22] For a fuller discussion of practices discussed in this paragraph, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1104-1112 (1996); *see also* Katherine Ikedam, *Silencing The Objectors*, 15 GEO. J. LEGAL ETHICS 177, 180 (2001).

persuading the court to reject a settlement on grounds of inadequate representation (or indeed, on any grounds), there will be no fund from which that counsel can recover fees. Thus, most objectors are careful to avoid pushing too hard arguments that might completely scuttle the settlement. This is yet another reason it makes no sense to hold that the presence of objectors somehow suffices to eliminate the rights of all absentees to attack the settlement collaterally. More to the point, no one shows up to object in most class actions.[23] In sum then, with or without objectors, the first court's decision on adequacy is highly unlikely to be based on clashing presentations by true adversaries. Indeed, even those objectors dedicated to the presentation of serious objections – even those willing, if necessary, to scuttle the entire deal – are severely limited in their effectiveness because most courts either deny them discovery altogether or sharply restrict it.

Thus, in the real world *de novo* review makes perfect sense. The second court cannot be confident that the first court had the necessary information before it in rendering its findings on adequacy. It is the second court, not the first, that is more likely to hear that clash of positions deemed central in our system to reliable court rulings. A fairness hearing on a proposed class settlement may consist of nothing more than a rehearsed joint presentation by class counsel and defense counsel. In Judge Easterbrook's words, "[r]epresentative plaintiffs and their lawyers may be imperfect agents of other class members –

[23] *See* Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenge*, 71 N.Y.U. L. REV. 74, 140 (1996) (concluding that there were no objectors in 42 to 64 percent of the fairness hearings in four federal judicial districts).

may even put one over on the court, in a staged performance.... The court can't vindicate the class's rights because the friendly performance means that it lacks essential information." *Kamilewicz v. Bank Boston Corp.*, 100 F.3d 1348, 1352 (1996) (dissenting from denial of rehearing on banc). Given the realities of class action practice, *de novo* review by the second court is essential to give meaning to the due process requirement of adequate representation in fact. To change existing law and adopt a standard of high deference to the first court would be to adopt a rule that presumes a world that does not exist.

IV. Petitioners Rely on Analogies That Make No Sense

Petitioners rely on several analogies that make no sense. But because petitioners emphasize the importance of these analogies, we think it important to address them, albeit briefly.

Most notably, in arguing against *de novo* review of the adequacy of representation provided in the original proceeding, petitioners rely on an entirely unconvincing analogy between class action practice and habeas corpus proceedings attacking criminal convictions. In a criminal case, the defendant is keenly aware of the fact that a court has purported to exercise power over her. The criminal defendant is present at all important junctures of the case; she is provided with counsel if she cannot afford her own; and she has the opportunity to contest the original court's exercise of power over her on direct appeal. The relation of the absentee class member to the original litigation could not be more different.

Second, petitioners invoke *Teague v. Lane*, 489 U.S. 288, 295 (1989), and its progeny to try to ward off the

holdings regarding inadequacy of representation in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 597 U.S. 815 (1999). *Teague* is inapplicable here, even if (as is not the case) the habeas analogy made sense. *Teague* is inapplicable because neither *Amchem* nor *Ortiz* explicitly or even implicitly overrules any precedent of this Court.[24] The federalism concerns that underlie *Teague*, moreover, have nothing to do with this case. Finally, *Teague* is inapplicable because even if *Amchem* and *Ortiz*'s lessons about subclassing somehow could be seen as akin to new requirements for state authorities to follow in criminal cases, those "new" lessons would speak only to whether the representation here was adequate, not whether adequacy can be challenged in a collateral attack.[25]

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[24] Nothing in the language of either case suggests that the Court understood itself to be breaking, substantially or otherwise, with existing precedent, no less existing constitutional rules. Quite the contrary, both opinions are expressly grounded in language contained in Rule 23 that was already in place well before the Agent Orange litigation commenced.

[25] Notice, however, that petitioners worry about *Amchem* and *Ortiz* because they want this Court to accept that the representation in this case was adequate when this class action was originally determined. We mention that here because time and again petitioners' brief and that of their amici conflate the question of whether collateral attack should be available to absent class members with the question of whether these respondents were ever adequately represented in fact. The two questions must be kept apart. Petitioners encourage this Court to make new procedural law by delving into the merits of adequacy here throughout their brief. Even their discussion of the ill-cited *Matthews* balancing test roams back and forth between an *ad hoc* balancing of the interests at stake in this litigation and the more generalized balancing *Matthews* actually contemplates, assuming that case were relevant here. We do not base any of our argument on the inadequacy of representation in this particular case (or the notice problems here or

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Finally, in arguing that respondents were adequately represented in the original proceedings before Judge Weinstein, petitioners draw an analogy between the relief afforded to respondents in this case and a kind of "term insurance policy." *See Petitioners' Brief*, at 37. Of course, as petitioners themselves recognize, the question of adequacy of representation is distinct from the question of whether the settlement was fair. Nonetheless, as petitioners also recognize, at least implicitly, if one's representative settles one's claim for nothing of value, legitimate questions about adequacy are raised. They thus seek to convince this Court that something was provided. Again, that is irrelevant to whether respondents should be allowed to argue in a separate proceeding that the representation they received was inadequate. But, as petitioners push the "insurance policy point," we respond that doing so only embarrasses their other references to "rationality." No rational consumer would buy "term insurance" of the sort petitioners describe. The settlement established a compensation fund from which distributions began in 1988. No persons who became ill after December 31, 1994, were entitled to any recovery from the fund. (Adding insult to injury, persons

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the question of "futures" as particularly disabled absentees). That is not because we think the representation here was adequate or the notice acceptable or the inclusion of futures without subclassing consistent with Rule 23. We have grave doubts about all of that as the next paragraph in our text demonstrates, and we assume respondents will include in their arguments the contention that, at the very least, people similarly situated to themselves should be allowed the right to attack collaterally. We submit that such a holding would be too narrow, however, and have filed this brief in order to show that the right to attack collaterally must be preserved for all absentees without regard to the special circumstances present in the particular case.

who became ill before December 31, 1994, were entitled to recovery from the fund, but only if money happened to be left in the fund when they became ill, and no provision of the settlement was designed to ensure that a significant amount of money remained in the fund until December 31, 1994.) One would have to be quite irrational to buy any such "insurance" or to even understand such a deal as "insurance." Thus, the case in which petitioners argue that adequacy can be successfully assured by the initial court could not be weaker for that argument – a fact that may explain why they so desperately seek this Court to change the existing law entitling absentees to collateral review.

CONCLUSION

For the foregoing reasons, we urge that the traditional rule permitting collateral review of adequacy of representation at the instance of any absent class member be maintained, and that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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43D